service to their communities of license. These arguments are unproven and, in any event, largely immaterial and irrelevant.

Both the Act and well-established Commission precedent reject the use of regulatory powers to protect the market share of segments of the communications industry from new communications technologies or even from competitors within the same industry segment. If there is any lesson to be learned from 60 years of regulation, it is that protectionism is self-defeating and antithetical to the public interest.

A. Opponents Face A Heavy Evidentiary Burden.

Case Law In Directly Analogous Circumstances Establishes A Stringent Standard. The Commission has well-established criteria, affirmed by the courts, regarding the evidence necessary to sustain allegations of competitive harm to the terrestrial broadcasting industry. The Commission addressed this issue in a completely analogous situation -- the delivery of video programming by satellite.

In its decision authorizing Direct Broadcast Satellites ("DBS"),[35] the Commission established an extremely high hurdle to the adoption of prohibitions on new satellite-based competitors to broadcasting. The Commission held that economic impact may be considered *only* if **"there is strong evidence that a significant net reduction in service to the public will result."**[36] The Commission also concluded it could not refuse to authorize a new service "solely on the basis of speculative allegations concerning possible reductions in services from

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[35] *In Re Direct Broadcast Satellite, Report and Order*, 90 FCC 2d 676 (1982) [hereinafter *DBS Order*].

[36] *DBS Order*, *supra* note 35 (emphasis added). The new service must be ". . . likely to have a substantial adverse impact on local services." *Id.* at 1353-54.

other sources." The Commission further concluded that it "cannot reject a new service solely because its entry will reduce the revenues or profits of existing licensees."[37]

These findings were easily upheld by the Court of Appeals for the D.C. Circuit. The Court found that "existing systems, like existing licensees, have no entitlement that permits them to deflect competitive pressure from innovative and effective technology."[38]

These holdings were a direct result of the culmination of several years of rethinking by the Commission of its traditional inclination to protect its familiar constituencies from the unknown. The Commission has concluded that it was no longer sound policy to consider the economic impact of new competitors on individual stations, no matter how large the economic injury to the station in question. In Detrimental Effects of Proposed New Broadcasting Stations On Existing Stations,[39] the Commission held "private economic injury is by no means always, or even usually, reflected in public detriment. Competitors may severely injure each other to the great benefit of the public."[40]

It is well settled, then, that the Commission acts upon allegations of harm only when so many stations are effected that the industry as a whole is adversely impacted *and* the public suffers a substantial net loss of services. Thus, there is a two-step, conjunctive burden of proof. First, opponents must adduce "strong evidence" of an adverse impact directly attributable to the new entrant. Second, they must demonstrate that the public would suffer a

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[37] *Id.*

[38] *NAB v. FCC, supra* note 34. *See also Allocation Order, supra* note 34, para. 23.

[39] 3 FCC Rcd. 638 (1988), *recon.* 4 FCC Rcd. 2276 (1989).

[40] *Id.* at 587 (*citing Carroll Broadcasting v. FCC*, 258 F.2d 440, 443 (D.C. Cir. 1958)).

"substantial net decrease" in services, adding the new services being offered after subtracting any services predicted to be lost. Only then may the Commission consider whether a regulatory response is warranted.

The *DARS NPRM* affirms, and is consistent with, the burden of proof established in this line of cases. The *NPRM* quite properly recognizes that this burden must be considered in light of its Section 7 mandate to promote new services and technologies. Section 7 (a) codifies the conclusions of the failed protectionist policies of the past by declaring that

> it shall be the policy of the United States to encourage the provision new technologies and services to the public
>
> [and]
>
> that any person or party (other than the Commission) who opposes a new technology or service proposed or to be permitted under this Act shall have the burden to demonstrate that such proposal is inconsistent with the public interest.

The Commission appropriately stresses that the public interest in the instant case includes the protection of competition, not competitors. Thus, the economic impact of DARS is relevant to the public interest analysis only "to the extent that such impact would predictably lead to serious loss of important services to consumers . . ."[41] Moreover, this analysis must not occur in a vacuum but must subsume the continuing liberalization of radio regulations and increasing service and revenue opportunities for broadcasters.[42] In light of the burden

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[41] *DARS NPRM*, *supra* note 1, para. 11.

[42] *Id.* Presumably this includes new growth opportunities in the form of in-band on-channel digital audio broadcasting as well as radio broadcast data systems ("RBDS"). The wireless data market in which broadcasters could participate through RBDS is expected to grow to almost $1 Billion by the end of the decade. *Digital Audio Broadcasting: Phase I*,

established by Section 7 of the Act, the DBS decision as affirmed by the *DARS NPRM* and the unique characteristics of the radio industry, there is simply no way that opponents of DARS can sustain a case for further delay much less restrictive conditions.

B. Analysis of Economic Impact Issues Must Consider Information Regarding the Relevant Industries.

The Broadcast Industry. The broadcast industry is economically sound and stable -- never more so than when it is faced with competitive entry. The President of the NAB recently affirmed this fact: "As we celebrate the 75th anniversary of our great medium, it is clear that radio . . . has evolved and thrived in the face of competition that would have felled others." *See also* Statement of Dr. Larry F. Darby, attached hereto.

Radio has continually demonstrated its ability to adapt to a changing marketplace in the past. There is nothing to indicate it will fail to do so in the future. It has inherent strengths that are not easily matched or dislodged by competing media entering the audio entertainment marketplace: conventional radio delivers local content and strongly appeals to local advertisers; it is flexible and can rapidly change program formats to appeal to different audiences and advertisers; it is pervasive, portable and affordable both to end-users and advertisers. It is inconceivable that satellite DARS can have any impact equal to, or in excess of, cassette tapes, compact discs or even the 80-90 "drop-ins."

As the Commission notes, terrestrial digital audio will be available by the time DARS service is initiated. This will give consumers more choices in digital audio entertainment and will aid digital receiver penetration as consumers become more aware of digital audio

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prepared for the Corporation for Public Broadcasting, Bortz & Company, Inc., (Mar. 4, 1993) at 114-115, 119-121.

programming. Moreover, DARS programming will be qualitatively different from broadcast digital programming. DARS programmers will be driven to aim most of their programming to audiences that are theirs alone (geographically-dispersed but demographically homogeneous groups), rather than compete head to head with established broadcasters with established audiences. As a result, the two services will be largely complementary rather than competitive. DARS will be predominantly national programming, local programming will remain the foundation, and unique strength, of conventional radio.[43]

The DARS Industry. The Commission must bear in mind that, because DARS is a first generation service, it is difficult to predict with any reliable degree of certainty how quickly or in what manner the service will develop. In addition, the Commission needs to recognize that, particularly given the investment to be committed and the technically complex and advanced nature of the service, the type of information it seeks is highly proprietary.

DSBC has prepared, and continues to revise, its business plan, and has conducted, and continues to conduct, extensive market research to identify the best methods to gain a foothold in this new industry. In addition to DSBC, the other applicants have their individual and highly confidential business plans. Each applicant will approach the still uncertain DARS marketplace from its own, unique perspective. As in any free enterprise system, the consuming public will shape the industry. By its very nature, the information requested by the Commission regarding the specifics of business approach, pricing schemes, expected programming formats, etc., has been gained only at great expense and on the well-justified assumption that its proprietary nature would be protected. It is therefore inappropriate for

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[43] *See* note 32, *supra* and text.

most of this information to be publicly disseminated.

Within these limitations, DSBC will offer here its own best estimates regarding actual spectrum use requirements, capacity and services. It is important to note, however, that DSBC's current and still evolving satellite design, technology and business plan will cause its view to differ from the other DARS applicants. As the Commission is aware, DSBC currently proposes a service comprised of a CONUS beam and multiple spot beams.[44] Each beam will carry multiple channels of program information, the channel capacity being determined by the multiplexing scheme and the coding employed, the amount of usable spectrum, the satellite power available from the generation of satellites in use at the time of launch and bit rate demands of individual programs.[45] Assuming a nominal data rate of 128 kBps and the current state of compression technology, DSBC can expect to provide at least 35 channels to any area of the country covered by the CONUS beam and a spot beam[46] in its share of the spectrum available to DARS applicants.

DSBC has completed preliminary market research that provides an indication of what consumers may seek from DARS. Respondents expressed equal interest in DARS for both

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[44] DSBC's system has 24 spot beams -- 21 covering much of the lower 48 states and one beam on each of Hawaii, Alaska and Puerto Rico. DSBC originally requested 25 MHz of spectrum for its system and proposed 31 spot beams. The applicants have decreased their proposed system capacities and spectrum needs to effect a spectrum sharing arrangement filed with the Commission.

[45] For example, a voice-only program may require a data rate less than a music channel. As bit rates are reduced, the number of channels that can be generated increases. Thus, at this time it is impossible to identify the precise number of channels that may be provided.

[46] This channel capacity is feasible utilizing either CDM or TDM modulation. DSBC anticipates that about 20 channels will be provided in the CONUS beam and about 15 on each spot beam.

fixed and mobile locations, but, not surprising, demand is high for a wide variety of programming formats regardless of mobility. Consumers appear most likely to purchase a DARS receiver if it does not exceed the cost of an AM/FM cassette deck by much more than $100 and will buy DARS equipment as part of the ordinary radio replacement cycle or as part of another purchase decision. Where subscription fees are levied, they should vary depending on program options selected. More than one-third of respondents expressed a willingness to pay in excess of $10 per month for DSBC's proposed multichannel service. It is impossible at this time to determine what portion of the services will be fully or partially advertiser-supported. Nevertheless, DARS can be expected to attract national, not local, advertising dollars.[47] We believe that the receiver costs and service fees desired by the majority of survey respondents are attainable, will support necessary penetration levels and will permit an economically viable DARS service to be initiated.

DSBC's assumption set is based on a several variables including the number of DARS competitors. When developing its business case, DSBC assumed four DARS systems would be launched. As the Commission noted, six applications for DARS were originally filed. After lengthy discussions, that number was winnowed to four. The remaining applicants assessed the technical landscape and concluded that the 50 MHz allocated to DARS could accommodate the four remaining applicants, each of which could initiate an economically viable service.[48]

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[47] National dollars account for only 17-18% of local station advertising. Veronis Suhler and Associates.

[48] See Letter to Cecily Holiday from Richard E. Wiley, Douglas J. Minster and Howard Liberman dated Nov. 17, 1993. The fourth applicant only requested 10 MHz in its

It is important to note that these activities were concluded only after reasoned business and technical analysis by the applicants and their advisors demonstrated that four entities would be economically and technically viable in the 50 MHz of spectrum available for DARS. Moreover, four service providers should ensure robust competition among DARS operators. To the extent that this is not the "right" number the market will adjust it accordingly. The Commission should not, *a priori*, substitute its view of the proper number of competitors.[49]

Existing Multichannel Audio Service Providers. The Commission has facilitated the provision of multichannel subscription digital audio services to consumers through cable and DBS, reaching hundreds of thousands of homes by cable and available to the entire U.S. by satellite. These services initiated operations several years ago with approximately 30 channels of commercial free CD-quality music at subscription rates between $8-15, remarkably similar to DARS. The Commission has never questioned the potential economic effects on broadcasters, nor have the broadcast lobbyists opposed the offering of these services., despite

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application, less than the proportionate share. Where applicants have modified their spectrum requirements and developed a spectrum sharing arrangement, the Commission has deferred to their judgement. *In Re Amendment of the Commission's Rules to Establish Rules and policies Pertaining to a Non-Voice, Non-Geostationary Mobile Satellite Service, Report and Order,* ___ FCC Rcd. ___, para. 19 (1993) [hereinafter *NVNG Order*].

[49] If regulatory history, particularly with regard to satellites, has any useful prologue, it is that the Commission must let the marketplace drive the technical design, services to be provided and the number of providers that make economic sense. From the very beginning the Commission followed these precepts in introducing new satellite services. *See, In Re Amendment of the Commission's Rules to Establish Rules ad Policies Pertaining to a Mobile Satellite Service in the 1610-1626.5/2483.5-2500 MHz Frequency bands, Report and Order*, 9 FCC Rcd. 5936, para. 66 (1994) [hereinafter *Big LEO Order*]. ("Satellite design decisions involve complex trade-offs between engineering, marketing and financial considerations, which are difficult to evaluate without reference to the functioning of the marketplace.")

the fact that the primary target of these services, the fixed location market, is roughly twice the size of the automobile market, which is the primary target of DARS; and the largest single amount of radio listening occurs at home.[50] It is difficult to reconcile the Commission's detailed inquiry into DARS with its indifference to existing high-quality multichannel audio services that offer, or will soon offer, many more channels than DARS licensees would provide in the aggregate.[51] Nevertheless, these services have been permitted to develop without the need of Commission approval and no discernible impact on conventional radio audiences or revenues has been shown. A similar effect, or lack thereof, can be expected from DARS.[52]

IV. THE PUBLIC INTEREST WILL BE BEST SERVED BY THE IMMEDIATE GRANT OF LICENSES TO PENDING APPLICANTS.

The Commission tentatively concluded that the proposed DARS systems are capable of operating in the spectrum allocated to DARS without causing harmful interference among

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[50] Sixty per cent of listening occurs at fixed locations. *Veronis, Suhler & Associates Communications Industry Forecast 1995* at 131.

[51] DMX Direct currently delivers 80 CD-quality channels throughout the U.S. and is expected to deliver 120 channels by the end of 1995. *No Static At All: Digital Music Express (DMX)*, Stereo Review, July 1995 at 24.

[52] Independent analysis supports this conclusion, "Based on a review of early digital cable audio results and satellite digital radio proposals, satellite and/or other subscription-based DAB services will pose relatively little threat to commercial radio broadcasters. These services appear likely to evolve as niche products serving audiophiles and underserved listening populations . . ." Trautman, James M., Paul Bortz et al., *Digital Audio Broadcasting: Summary Report*, prepared for the Corporation for Public Broadcasting, Bortz & Company, Inc., May 1994.

DARS operators.[53] *Despite this well founded conclusion that the DARS applications are not mutually-exclusive*, the Commission seeks comment upon licensing alternatives and regulations based on competitive bidding scenarios that are only an option where mutual exclusivity among applicants exists. The Commission, therefore, proposes to create mutual exclusivity where, it concedes, none exists. In recognition of this fact, the Commission suggests that it may "choose[ ] to" reopen the application cut-off filing window in order to accept additional applications and create mutual exclusivity.[54] Such a result is unsupported by the record, inconsistent with the public interest, not permitted by the auction legislation, unsound public policy, and manifestly unfair to the existing applicants.

A. The Available Spectrum Will Accommodate All Pending DARS Applicants.

The Commission suggests licensing only 40 MHz of DARS spectrum because of alleged difficulties in coordinating the lower 10 MHz of the band with Canada. It appears, nevertheless, that the Commission believes that such coordination can be achieved at least sufficiently to permit a viable U.S. service. The Commission indicated that it was willing to assign the entire 50 MHz (12.5 MHz to each of the four current applicants) if "the record clearly demonstrates that the lower 10 MHz does not result in an inequitable coordination

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[53] The Commission takes this position regardless of whether 40 MHz (*DARS NPRM*, *supra* note 1, para. 78) or 50 MHz (*Id.*, para. 95) is ultimately the "usable spectrum."

[54] *DARS NPRM*, *supra* note 1, para. 94-95. "In order to employ auctions in any given service, the Commission must determine if mutual exclusivity exists between applications. Although it does not appear on the existing record that the four current applicants are mutually exclusive, if additional entities file, given the limited amount of spectrum available, *i.e.*, 50 MHz, all applicants' proposals might not be able to be accommodated." *Id.*

burden among the licensees."[55]

The record, as supplemented by a clarifying pleading being submitted simultaneously herewith by CD Radio, does demonstrate that existing applicants can successfully coordinate the lower 10 MHz. Canadian and U.S. bilateral coordination meetings regarding digital audio implementation in the L- and S-Bands have recently been convened. The CD RAdio clarification of its earlier analysis of Canadian frequency coordination with U.S. DARS clearly shows that there is no technical reason why the lower 10 MHz can not be coordinated between the U.S. and Canada.[56] Finally, since the Commission is willing to license the lower 10 MHz to an entity that purchases it through auction, the same spectrum should be suitable for any other willing user, especially existing applicants. Thus, the Commission is free to define the "usable bandwidth" as the full 2310-2360 MHz and adopt the four 12.5 MHz band segment approach.

This band segment licensing approach furthers the public interest goals identified by the Commission in this and other proceedings, *i.e.*, efficient licensing and rapid initiation of new services to the public.[57] Here, the goal of efficient licensing is achieved by grant of licenses to the four current applicants. In contrast to any other Commission licensing option

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[55] *DARS NPRM*, *supra* note 1, para. 82.

[56] *See* Comments of CDRadio filed Sept. 15, 1995. The CDRadio analysis accurately demonstrates that coordination is feasible for a DARS system having the stated parameters. No two DARS systems are identical. Other applicants that may employ differing parameters can also be coordinated in accordance with the international Radio Regulations and without creating an inequitable burden on any applicant.

[57] Licensing speed and efficiency are of paramount importance where, as here, the licensees will offer new service to rural areas of the country. *Big LEOS Order*, *supra* note 49, para 80.

this can be accomplished with minimal procedural delay.[58] No additional filings are necessary, other than amendments to bring existing applications into compliance with any rules adopted in this proceeding and to incorporate any new, relevant technology. Shortly thereafter, the Commission can, and should, license all four applicants to jointly use the full 50 MHz and avoid letting spectrum lie fallow while additional licensing procedures are initiated.

Finally, assigning the full 50 MHz in 12.5 MHz segments to the existing applicants recognizes the substantial and undeniable equities favoring the current DARS applicants. They have been on file as long as five years.[59] During this time, the applicants have expended considerable time and financial resources (and have foregone other substantial opportunities in telecommunications) in order to comply with the Commission's procedures, prosecute their applications, and develop DARS. The applicants timely filed comprehensive applications pursuant to an official cut-off date notice, paid substantial "processing" fees (between one-half and three-quarter million dollars, among the highest allowed at the time), participated in the allocation and rulemaking proceedings, participated in U.S. and international activities of the ITU-R, prepared and filed Pioneer's Preference Requests, and, at the Commission's request, prepared, filed and revised advance publication documents to begin

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[58] Auctions will further delay the start of DARS. The Commission must open a new filing window, accept and process applications and conduct the auction, for which the queue is considerable. Winning bidders will then have to prepare and file comprehensive satellite applications that will then be subject to comments and petitions to deny. The pending DARS applicants completed this process over two years ago.

[59] In Commission parlance, this proceeding has consumed at least 13 "red tape" years, i.e., the aggregate number of years the four applications have been pending. It disserves the public interest, and the applicants, if the Commission incurs further unwarranted delay.

the international coordination process. To now deny these applicants access to the full 50 MHz in order to solicit additional applications and to facilitate auctions unfairly and illegally ignores the applicants compliance with the Commission's identified procedures and their time-consuming efforts to further the initiation of DARS.

B. The Act's Auction Criteria Have Not, And Cannot, Be Satisfied.

1. Auction Criteria. Section 309(j) permits the Commission to use auctions to assign licenses only where *each* of the following criteria are satisfied: (1) there are two or more mutually exclusive applications; (2) the principal use of the spectrum will entail compensation from subscribers rather than advertising; and (3) the public interest objectives of Section 309(j) will be promoted. Criteria (1) and (3) cannot be met in this case and there is doubt whether criteria (2) will be fully satisfied at the time that the applicants' plans are finalized.[60].

The Commission concedes that the DARS applicants are not mutually exclusive. The applicants analysis and efforts confirm this conclusion Substantial effort was expended two years ago to eliminate mutual exclusivity among the identified pool of applicants and accelerate the licensing process. A negotiated rulemaking was requested to speed the development of technical rules.[61] The pool of applicants was reduced through settlement.

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[60] Even if the Commission were to conclude, based upon the applications as filed in December 1992, that the primary use of the DARS spectrum would likely be for subscription-based services (thereby satisfying the second of the conjunctive criteria), that finding could only be preliminary and would have to be supplemented (in order to be valid and sustainable on appeal) by up-to-date facts based upon amendments from the applicants to their service offerings following the adoption of technical and operating rules .

[61] *Request for Establishment of an Advisory Committee to Negotiate Proposed Regulations*, filed by DSBC, Jan. 19, 1993.

Subsequently, three of the four remaining applicants negotiated a reduction of their spectrum requirements and developed a proposed sharing arrangement which was submitted to the Commission almost two years ago. More recently, economic analyses based on four applicants were prepared and submitted,[62] as were proposed rules.[63]

Had the early efforts been promptly acted upon by the Commission as required by Section 7 of the Act, the licensing process would have been completed before the Commission's competitive bidding rules became effective.[64] Thus, it is through no fault of the applicants that their applications were still unprocessed when auctions were implemented.[65] Although the four applications as originally filed would have been mutually exclusive, the applicants can (and will) amend their applications to eliminate conflicts once the service rules are adopted.[66]

The applicant's efforts to eliminate mutual exclusivity comport with the Act which states that the Commission is *obligated to* "use engineering solutions, negotiation, threshold

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[62] *Satellite Radio: Good for the U.S. Consumer*, (filed Sept. 6, 1994); Statement of Primosphere Ltd. Partnership (filed Jan. 3, 1995).

[63] *Supplemental Comments of CDRadio*, Nov. 9, 1994; *DSBC Reply to Supplemental Comments*, Nov. 23, 1994.

[64] A substantial case can be made that the auction legislation, interpreted in light of the dictates of Section 7, both (a) and (b), does not permit the Commission to deliberately delay acting upon a new service proposal in order to protect the existing service providers (as it admittedly did here) and then invite new applications in violation of well-established cut-off rules in order to conduct an auction.

[65] It should be noted that conventional broadcasters used the intervening time to perfect their terrestrial in-band digital technology Thus, DARS has doubly suffered, it has been delayed while entrenched interests were permitted to establish firmer footholds, and now DARS must work its way out of auctions implemented long after applications were filed.

[66] *Big LEO*, *supra* note 49, at para. 230.

qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings."[67] The Commission affirmed this obligation in the rulemaking to develop technical and service rules for Big LEOs.[68] In that proceeding the Commission expended immense effort to resolve mutual exclusivity. It convened a Negotiated Rulemaking and proposed band plans that would have permitted all applicants to be licensed with some design modifications. In contrast, the DARS applicants' request for a negotiated rulemaking, development of a band sharing proposal and elimination of mutual exclusivity have been disregarded. Instead, the Commission proposes to recreate mutual exclusivity and auction the DARS licenses. Simply put, the LEO applicants were told that if they did not eliminate mutual exclusivity, they would be auctioned. The DARS applicants are told that, even though they eliminated mutual exclusivity, they will be auctioned.

These positions are difficult, and in our view impossible, to reconcile. The Commission cannot acknowledge that its proffered solution resolves the mutual exclusivity issue, but then vitiate the applicants' efforts and return them to a mutually exclusive situation, without violating both the letter and spirit of the auction legislation and Section 7 of the Act and its own precedent.[69] Yet this is the plain result of the Commission's actions.

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[67] 47 U.S.C. § 309(j)(6)(E).

[68] *Big LEO Order*, *supra* note 49, para. 71.

[69] As the Court of Appeals has been forced to remind the Commission from time to time, the Commission cannot arbitrarily reverse applicable precedent. Although the Commission has a certain degree of freedom to reach different conclusions on similar sets of facts, it must engage in "reasoned decision-making" and must explain in a rationale way supported by a "reasoned analysis" its departure from precedent. The Commission, no more than any other agency, may not "act arbitrarily nor can it treat similar situations in dissimilar ways." *Greater Boston Television Corporation v. FCC*, 444 F.2d 841, 852 (D.C. Circuit 1970); *Leroy Garrett v. FCC*, 513 F. 2d. 1056, 1060 (D.C. Circuit 1975)

Even assuming, *arguendo*, that the applicants had been unsuccessful at eliminating mutual exclusivity, the Commission has discretion to use licensing methods other than auctions for applications filed before July 26, 1993, the effective date of auction authority. In such cases, it has found that equitable concerns favored using a lottery, even though the applicants otherwise met the statutory auction criteria and auctions are preferred over lotteries.[70] DARS presents a more compelling "pre-filed" case. Equities in the prior cases included minor application preparation burdens, minimal fees, and no activity to prosecute the applications. In addition, the Commission considered the time on file and whether delay was attributable to the applicants. DARS applicants possess much greater equities. As a result, it is well within the Commission's authority to grant DARS licenses without resorting to auctions, an authority that the equities demand be exercised.

Even if there were mutual exclusivity, and the Commission chose not to exercise its non-auction discretion, it is by no means clear that DARS meets criteria (2) and (3) of the auction statute. DARS is considered a subscription service because the Commission has defined it as such. There can be no assurance that the services ultimately offered several years hence will be predominantly subscription-based.

Finally, assignment of licenses to the current applicants will better serve the auction statute public interest criteria which include: (1) the rapid deployment of new technologies and services, especially to rural areas; (2) promoting economic opportunity and competition by disseminating licenses among a wide variety of applicants; (3) recovery of value of the

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[70] *Amendment of Parts 21 and 74 of the Commission's Rules*, MM Docket 94-131, FCC 95-230 (released Jun. 30, 1995) (Multipoint Distribution Service.); *Cellular Unserved Areas*, 9 FCC Rcd. 7387 (1994).

spectrum; and, (4) efficient and intensive use of the spectrum.

In sum, the absence of mutual exclusivity alone precludes the Commission from auctioning the DARS spectrum. Furthermore, the other two conjunctive auction criteria probably are not present in this situation either.

2. Both Law and Equity Prohibit The Commission From Reopening the Cut-Off Window.

The Commission recognizes that it cannot satisfy the auction criteria unless it changes the rules. Therefore, it proposes to reopen the DARS cut-off filing window to permit additional applications. This action is illegal, unprecedented and manifestly inequitable.

Cut-off rules serve two purposes -- administrative finality and protected status to the applicants "to prepare for what often will be an expensive and time-consuming contest, fully aware of the competitors they will be facing."[71] Respecting the finality of cut-of procedures is administratively efficient. The Commission notes that adherence to cut-off procedures promotes "orderliness, expedition and finality in the licensing process"[72] and that reopening the cut-off to new applications only delays the proceeding.[73] Accepting additional DARS applications will further delay this already lengthy proceeding resulting in the delay of new services to the public, a consequence that cut-off rules were created to avoid. "Opening a

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[71] *City of Angels Broadcasting v. FCC*, 56 RR 2d 1459 (1984).

[72] *Mobile Satellite Services*, 6 FCC Rcd. 4900,4914 (1991); *John W. Talbott*, 60 FCC 2d 511 (1976); *Radio Athens v. FCC*, 401 F.2d 398,401 (1968).

[73] In considering the use of auctions to license large LEOS and reopening the proceeding to accept additional applications the Commission stated: "Potential new applicants would need a reasonable amount of time, traditionally three months from the date of publication in the Federal Register, in which to develop and submit system proposals." *Big LEOS*, *supra* note 49, para. 80.

new filing window also would be inequitable to the pending applicants, who filed their proposals well before section 309(j) was enacted and who have spent considerable time and expense participating in this proceeding."[74]

Nevertheless, the Commission suggests that it may require the applicants to operate in only 40 MHz of spectrum, or less, notwithstanding their negotiated agreement to share 50 MHz,[75] and auction the balance. Even if the Commission finds sufficient reason to open a second round for that 10 MHz of spectrum, those new applications should not be processed until all first round applications have been assigned, after which any excess spectrum can be licensed.[76] If the Commission holds spectrum in reserve for which there is current demand, it unnecessarily lies fallow until the second round Such a result will delay the rapid initiation of services where applicants can, and will, utilize all spectrum allocated to DARS.

a. Reopening the Current Applicant Pool Violates Well-Established Cut-Off Procedures and Rights and Undermines Commission Policy.

A long history of case law establishes that the cut-off rules are to be strictly enforced and will only be waived in compelling circumstances.[77] No such circumstances have been, or can be, alleged. The only discernible reason for the Commission to propose to reopen the

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[74] *Big LEO Order*, *supra* note 49, para. 80.

[75] Where applicants have devised a sharing plan based on their estimates of spectrum requirements, the Commission has found that "[d]ifferent, arbitrarily imposed limits on system size could force a licensee into what may very well be an artificially, and unsupportably, low system capacity." *NVNG Order*, *supra* note 48, para. 19.

[76] *NVNG Order*, *supra* note 48.

[77] *E.g.*, *Meredith Heritage Strategic Partners, L.P.*, 76 RR 2d 1060 (1994); *Waivers of Applications Filing Deadlines*, 58 RR 2d 1706 (1985)(waiver only upon "unusual or compelling circumstances" that must involve "a calamity of a widespread nature that even the best of planning could not have avoided"); *Bronco Broadcasting Co.*, 36 RR 2d 1587 (1976).

proceeding on its own motion, and engage in the legal and administrative contortions necessary to do so, is to create mutual exclusivity and an auction scenario. This result is without precedent, fundamentally unfair to applicants and consumers alike, and will render the integrity of Commission application procedures suspect in the future.

Proper notice of the DARS application window was provided three years ago. As a result, any attempt to reopen the window must evince unusual or compelling circumstances. However, this issue is moot because, in three years, there has not been a single additional application filed or a formal request that the cut-off be reopened. The only expressed interest in reopening the application submission deadline comes from the National Association of Broadcasters, DARS most vehement opponent, and therefore a completely incredible advocate for waiving the cut-off rules. Moreover, the Commission offers no legal or practical justification to waive, on its own motion, a three year old cut-off date.

Cavalier administration of the cut-off rules will adversely impact Commission policies. Proceeding blithely to reopen a cut-off window risks undercutting the Commission's spectrum management goals, *i.e.*, encouraging entities to identify underutilized spectrum, develop new services, and petition the Commission for such use by offering cut-off rights for applicants and the certainty of an identified applicant pool. Knowing that johnny-come-latelies can file applications at any time after a cut-off window destroys these incentives. Moreover, there will be no incentive to negotiate settlements, eliminate mutual exclusivity or develop rules not knowing if the parties around the negotiating table comprise the universe of applicants or if more will be added later.

b. Reopening the Filing Window Will Guarantee Years of Delay.

The delay caused by the Commission's proposal to reopen the licensing process and auction DARS licenses will add years to the licensing process as the case moves through the appeals process. This delay plays directly into the hands of the incumbents which seek to increase their lead over DARS by ensuring that the licensing of this new service is as difficult and costly as possible. Such a result will violate Section 7's goal of rapid initiation of new services and the auction statutes public interest goal of efficient licensing. Even if the Commission ultimately prevails on the cut-off and auction issues, the time consumed to exhaust all administrative and judicial remedies ensures that no auction revenues will derived from DARS until after the millennium.

3. The Commission's Proposal Violates Decades of Domestic Satellite Processing Procedures.

Since their inception in the early 1970s, the satellite services have been consistently recognized as technically and operationally unique, requiring the Commission to utilize novel licensing procedures. Unlike its process in other services, the Commission invites applicants for new satellite services to submit their applications prior to the adoption of the technical and operational rules and often prior to a final decision on the threshold question of whether proceeding to authorize any one in the service is in the public interest. The Commission repeatedly has concluded that the technical complexity and the extraordinary lead time required uniquely in the satellite services requires this previously unprecedented approach.[78]

By inviting and accepting satellite applications simultaneously with the initiation of the

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[78] *Mobile Satellite Services*, 6 FCC Rcd. 4900, 4904 (1991) (setting out the history of satellite application processing.)

rulemaking proceeding, the Commission has been able to shift to the private sector the substantial burden of illuminating, with much greater accuracy and more timely specifics, the best use of the spectrum and the most appropriate technology, and hence the most efficient regulations, to spur early implementation of that technology. This approach has worked better than anticipated and has had a significant hand in achieving worldwide dominance by the U.S. satellite industry. However, parallel processing of applications and allocation/rulemaking decisions places an enormous burden upon the private sector and occasions the expenditure of extraordinary sums by the applicants and their vendor allies, in particular the spacecraft and electronics manufacturers.

It is no exaggeration to state that, without the expenditure of these very substantial efforts, the Commission's initiation of new satellite services would be much slower and the guiding regulations much less suitable and subject to much more controversy. Simply stated, there should be no dispute, as confirmed by 25 years of experience, that the Commission would be caught in an insoluble dilemma between the demands of Section 7 that new services be initiated promptly and the realities of complex business decisions regarding new technology by its staff in a vacuum and with the resource constraints of the 1990s.

The Commission then should be exceedingly chary of discouraging the continued expenditure of substantial resources by satellite entrepreneurs. Yet, if these entrepreneurs are not rewarded for their efforts by an exclusive seat at the licensing table if and when the service is approved,[79] there should be no doubt that they will not come forward next time to

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[79] Because there can be no assurance that the Commission will approve the service, nor within a economically attractive time frame or under economically attractive conditions and, if so, that there will not be mutually exclusive opponents, limiting the licensing to the risk

expend such efforts. The Commission must, therefore, for this reason alone reopen the DARS filing window.

V. FLEXIBLE DARS REGULATIONS WILL PERMIT LICENSEES TO OFFER EFFICIENT, AFFORDABLE AND RESPONSIVE SERVICE TO THE PUBLIC.

DSBC believes that the most prudent path for the Commission is to adopt a simple and flexible regulatory framework for DARS. The Commission has recognized that new services, especially satellite services, are risky propositions that require regulatory flexibility with regard to service offerings, methods of financing and technical requirements, especially in a competitive environment. DARS rules should permit DARS licensees to investigate services and methods of financing and deploy technology that will ensure the development of a robust competitive service that is responsive to consumer demand.

A. Minimal and Flexible Technical Rules Will Foster DARS Service.

Service Area. DSBC intends to provide the widest coverage technically possible. The DSBC system will offer service to all 50 states and Puerto Rico. As a result, DSBC does not oppose the Commission's service coverage proposal.

Service Link Margin. DSBC agrees that applicants should not be required to provide a specific minimum service link margin, but should identify the service link margin for their systems in the geographic areas they intend to serve. There is ample incentive for each provider to deploy the most robust service link margin feasible throughout the identified service areas and still meet international coordination requirements.

Receiver Inter-Operability and Tunability. DSBC agrees that substantial benefits may

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taking applicants is hardly a windfall to them.

be gained if a receiver is developed that is inter-operable among the DARS systems and tunable across the entire DARS band. Such a receiver will create economies of scale necessary to make equipment affordable and encourage consumer investment in DARS receivers. Given the market incentives for compatible receivers, it is likely that the DARS industry will develop a standard without regulatory intervention.

Data Rates. DSBC agrees with the Commission's decision to permit DARS operators to employ different data rates to provide a mix of audio formats. The Commission should refrain from imposing an abstract standard such as "CD-Quality," and must modify its definition of DARS accordingly. Although DARS will offer significant quality improvements over analog broadcasts, there are different methods of achieving that improvement, each possibly utilizing different data rates and each referred to as "CD-Quality." Thus, permitting DARS operators to determine the appropriate data rates for different services based on the demands of the programming is spectrally efficient. and market driven.

Terrestrial Gap Fillers. Signal blockage and multipath can dramatically reduce the service link margin of any DARS system. Each applicant has a different view, based on service and technical choices, of the techniques that will best overcome this type of link degradation. DSBC proposes to provide service to urban and rural users utilizing a single satellite and link enhancement techniques that include Rake receivers, high link margins, and, possibly, terrestrial gap fillers.

The terrestrial repeaters are complementary to the satellite system, and are intended

only to fill in identified "white" areas, typically in urban canyons.[80] They operate on the same frequencies, utilize the same bandwidth and repeat the signal coming from the satellite. Thus, additional spectrum beyond that assigned to the DARS licensee is unnecessary. Moreover, the gap-fillers would be transparent to the end-user. In an area where both a satellite and a terrestrial signal are available, the Rake receiver automatically selects the stronger signal. Although additional study and testing is indicated, DSBC is convinced that extensive repeater use will not be necessary with its system.

DSBC proposes to employ gap-fillers to enhance its link margin, thus improving coverage and, ultimately, service to consumers. This comports with the Commission's authorization of boosters[81] to fill-in "white" areas in other services. In fact, it recently proposed to expand the use of signal boosters in various services based on the conclusion that signal boosters "have proven to be a viable and practical way to resolve signal coverage problems caused by natural or man-made obstacles." DSBC proposes nothing more than the Commission has already affirmed. DSBC agrees with the Commission's proposal that terrestrial repeaters be permitted only in conjunction with an operating satellite DARS system. Thus, the Commission should not *a priori* prohibit terrestrial gap-fillers.

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[80] The concept of "complementary terrestrial DARS" was posited by the Commission as an adjunct to a satellite-based system, rather than a stand-alone service. NPRM/FNOI, 7 FCC Rcd 7776 (1992) at n.9, affirmed, Allocation R&O at n. 4.

[81] "Boosters" are different from gap-fillers in name only. The Commission proposes to define "boosters" as "a stationary device that automatically reradiates signals from base transmitters without channel translation, for the purpose of providing service in weak signal areas." In Re Amendment of Parts 22, 90 and 94 of the Commission's Rules to Permit Routine Use of Signal Booster, Notice of Proposed Rulemaking, (released June 22, 1995), FCC 95-204, 60 FR 33782. A similar definition should be adopted for DARS.

Cross Polarization. DSBC assumes the Commission, although not stating the obvious, intends to allow the DARS applicants to employ orthogonal (cross) polarization in its assigned bandwidth. DSBC has no objection to the Commission's proposal to permit use of cross-polarization in other licensees's frequencies by mutual agreement.

Inter-Service Sharing. DARS operators should be permitted to create relationships that will promote the success of this new service, including inter-service sharing and acquisition of spectrum from other licensees, as proposed.

International. There is no international PFD limit and there is no record to support one either domestically or internationally. Thus, no PFD limit needs to be specified. Clearly, the only potential need for a PFD limit might be in regard to neighbors of the U.S. Experience has shown that the flexibility of the international coordination process is far superior to the rigidity of PFD limits.

Adjacent Band Services. DSBC recognizes its responsibility to meet the out-of-band requirements of Section 25.202(f) and obviously intends to comply with the Commission's rules. However, in the *DARS NPRM*, the Commission implies that more stringent out-of-band emission limitations may be needed to prevent interference to space research and aeronautical telemetry service in adjacent bands.

DSBC recognizes that importance of the adjacent band services identified by the Commission. At this time, however, operations in these services need to make known their requirements before detailed comments can be made. Nevertheless, DSBC must note that